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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 75-1690

JAMES PARHAM, ET AL., *Appellants*

v.

J.L. & J.R., ET AL., *Appellees*

On Appeal From the United States District Court for the Middle District of Georgia

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Brief of American Psychiatric Association, American Society for Adolescent Psychiatry, American Academy of Child Psychiatry, and American Association of Psychiatric Services for Children, as Amici Curiae

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INTEREST OF AMICI CURIAE

The American Psychiatric Association, founded in 1844, is the nation's largest organization of qualified doctors of medicine who specialize in psychiatry. Almost 24,000 of the nation's approximately 30,000 psychiatrists are members of the Association. It has participated as an amicus curiae numerous times in cases throughout the country involving mental health issues.

The American Society for Adolescent Psychiatry is a nationwide organization of approximately 1,200 doctors of medicine who specialize in the practice of adolescent psychiatry. The American Academy of Child Psychiatry is a nationwide organization of approximately 1,600 doctors of medicine who specialize in the practice of child psychiatry. The American Association of Psychiatric Services for Children is a national multi-disciplinary organization of child mental health agencies and professionals, whose membership includes 175 separate agencies with total staffs of approximately 10,000 people.

Amici believe this case to be of great significance to the quality of care available to mentally ill children. As organizations whose members have devoted their lives to the delivery of mental health care in this country, Amici hope that the clinical insights which they have developed will assist this Court in resolving the important constitutional issues presented by this case.

CONSENT OF THE PARTIES

Amici are filing this Brief with the consent of both parties, whose jointly signed letter of consent has been filed with the Clerk.

STATEMENT OF THE CASE

This case is here on appeal from a decision by a three-judge United States District Court for the Middle District of Georgia invalidating Georgia Code Annotated § 88-503.1(a), which governs the admission of children under age 18 to state mental hospitals. The named plaintiffs are two children, aged 12 and 13 at

the time the case was filed, who were hospitalized at Milledgeville State Mental Hospital. These plaintiffs filed a class action against officials responsible for administering the Georgia Department of Mental Health, suing on behalf of "all persons younger than 18 years of age now or hereafter received by any defendant for observation and diagnosis and/or detained for care and treatment at any 'facility' within the State of Georgia pursuant to [§ 88-503.1(a)]." *J.L. & J.R.* v. *Parham,* 412 F. Supp. 112, 117 (1976). Section 88-503.1(a), in relevant part, authorizes the admission to a state mental hospital of any child "under 18 years of age for whom such application is made by his parent or guardian" if the child is "found to show evidence of mental illness and to be suitable for treatment."

Plaintiffs sued under 42 U.S.C. § 1983, alleging that § 88-503.1(a) denied them due process of law insofar as it authorized hospitalization without providing a child "a meaningful and complete opportunity to be heard," and "without asuring him initial and periodic consideration of placement in the least drastic environment [*i.e.,* treatment setting]." 412 F. Supp. at 118.

The district court ruled that § 88-503.1(a) failed to satisfy the requirements of due process because it permitted parents or guardians to hospitalize children without a hearing. Accordingly, the court enjoined further application of the invalidated statute. The district court further ordered defendants to institute hearings within 60 days for all children then being held under § 88-503.1(a), either pursuant to the Juvenile Court Act or the involuntary commitment procedures

of the mental health laws,[1] or to release these children from any form of state care or custody. Finally, the court ordered defendants to expend the monies necessary to provide adequate non-hospital, community-based treatment facilities for the 46 children that defendants had previously determined could best be treated in such facilities.

This Court stayed the district court's order on July 2, 1976, and noted probable jurisdiction of this appeal on May 31, 1977.

SUMMARY OF ARGUMENT

This case presents novel and difficult questions concerning the treatment of mentally ill children and the proper procedures for parents and guardians to follow when residential psychiatric care is medically recommended for their children. The issues are complex, and their resolution will have a profound impact on the competing rights and interests of both children and their parents.

This Court has emphasized repeatedly that parents have a basic constitutional right and responsibility to control the upbringing of their children. *See, e.g.,*

[1] The Georgia Juvenile Code, applicable only to children under age 17, authorizes hospitalization only after a hearing unless the child is likely to harm himself or others or property. Ga. Code Ann. §§ 24A-1601-1602. In these "emergency situations," the child can be detained briefly without a formal hearing. Ga. Code Ann. § 24A-1701.

The involuntary commitment provisions of the Georgia Code likewise authorize hospitalization only after a hearing, absent emergency circumstances. Ga. Code Ann. §§ 88-504 *et seq.* The criteria for such commitments are that a mentally ill person either be "likely to injure himself or others" or "incapable of caring for his physical health or safety." Ga. Code Ann. § 88-507.1.

Wisconsin v. *Yoder,* 406 U.S. 205, 232 (1972); *Pierce* v. *Society of Sisters,* 268 U.S. 510, 534-35 (1925). This right is not without limitations, *see Planned Parenthood* v. *Danforth,* 96 S.Ct. 2831, 2842-2844 (1976); *Prince* v. *Massachusetts,* 321 U.S. 158, 166 (1944), but, absent extraordinary circumstances, it should be controlling in view of the fundamental legal and societal interest in preserving the integrity and autonomy of the family unit. The court below not only failed to give any consideration to this principle of parental rights and duties, but it also ignored the fact that in certain categories of mental health admissions the legal imposition of adversary hearing procedures, in the context of the delicate emotional problems presented by these parent-child conflicts, will prove therapeutically counter-productive for the child.

The decision below applies the deceptively simple syllogistic reasoning that a child's interest in avoiding admission to residential psychiatric care is an interest protected by the Fourteenth Amendment's Due Process Clause, and therefore that all the traditional elements of procedural due process must apply to all these cases. Such an approach should have been the beginning, not the end, of the analysis, however.

Once it is determined that due process applies, the courts must still undertake the separate and highly subtle determinaion of what process is due. *Goss* v. *Lopez,* 419 U.S. 565, 577 (1975); *Morrissey* v. *Brewer,* 408 U.S. 471, 481 (1972). Due process is a flexible concept, and its elements must be defined in each situation with full regard for the competing interests and practical consequences of their application. *Matthews* v. *Eldridge,* 424 U.S. 319 (1976); *Wolff* v. *McDonnell,* 418 U.S. 539, 563, 567 (1974).

The court below did not undertake such an analysis; instead it tried to fit the diverse situations presented by plaintiffs' class into a rigid due process model to which they do not conform. The court ignored the fact that the class of plaintiffs varies dramatically with regard to the factors most relevant to an assessment of the effect of the proposed procedures on the rights of children and their parents. The court also ignored the very real harms that formal adversary hearing procedures can create in certain categories of cases.

Amici recognize that there are serious flaws in our nation's system of mental health care for children. In some instances these problems may be exacerbated, rather than alleviated, by the decision below, however. Amici believe that this Court can and should identify certain well-defined categories of cases in which carefully crafted hearing procedures may be appropriate and helpful. But in other situations, the potential harm of such procedures far outweighs their possible value, and thus both law and logic demand that they be excepted from any constitutionally imposed rule.

Specifically, Amici contend that balancing the important competing interests at issue should lead this Court to except from formal hearing requirements those cases in which (1) parents in an intact family wish to admit (2) a pre-adolescent child (3) to an accredited institution (4) for a short-term period (*e.g.*, less than 45 days). In all other instances, Amici conclude that the court below properly ruled that due process protections are appropriate.

Finally, Amici believe that the court below correctly concluded that when, as here, the State Department of Mental Health has determined that the proper

treatment of children is in a non-hospital, community-based treatment facility, the Constitution requires the State to develop such facilities. Under the fundamental principles articulated in *Jackson* v. *Indiana,* 406 U.S. 715, 738 (1972), "due process requires that the nature and duration of commitment bear some reasonable relation to the purpose for which the individual is committed." *See also O'Connor* v. *Donaldson,* 422 U.S. 563 (1975). In Georgia, children are institutionalized in order to receive proper mental health treatment. Accordingly, the Constitution requires that when the State determines that such treatment is best provided in a non-hospital setting, the State must assure that such a setting exists.

I. THE DISTRICT COURT FAILED TO RECOGNIZE THE ESSENTIAL RESPONSIBILITIES AND RIGHTS OF PARENTS FOR THE UPBRINGING OF THEIR CHILDREN, AND THE POSSIBLE HARMS INVOLVED IN REQUIRING DUE PROCESS ADVERSARY HEARINGS IN ALL CASES.

As professional organizations whose members are devoted to assuring the highest quality of mental health care, Amici share the concern of plaintiffs and the court below that children frequently are admitted to mental health institutions that are not appropriate for their needs, or are allowed to remain in institutions far longer than medically desirable. In seeking to cure this problem, however, the district court attempted to fit this case into a traditional due process mold to which it does not easily conform.

In particular, while Amici support much of the analysis and many of the conclusions implicit in the ruling below, we nevertheless believe that the court's ultimate holding—mandating a due process hearing for

all children under 18 years old—was insufficiently sensitive to the various needs of the different subgroups that constitute plaintiffs' class.

In assessing the constitutional validity of § 88-503.1 (a), the lower court properly found that the statute could not withstand scrutiny because it authorized the indefinite hospitalization of *all* children—regardless of age and irrespective of whether they are hospitalized by their parents or by a state agency acting as legal "guardian." On this basis, the court concluded that "[t]his statute supplies not the flexible due process that the situation of the plaintiff children demands but instead, absolutely no due process." 412 F. Supp. at 139.

While the court's constitutional conclusion is unobjectionable, its remedy belies the flexibility that it urged. Relying heavily on cases such as *In re Gault,* 387 U.S. 1 (1967), the court decided that because § 88-503.1(a) was invalid, children in Georgia could be hospitalized only pursuant to other statutes, specifically the Juvenile Court Act and the provisions of the mental health code governing involuntary commitment. These statutes, in effect, require a preadmission hearing or, in emergency situations, a hearing shortly after hospitalization. *See* note 1, *supra.*

In ordering this remedy without analyzing its effect on the various subgroups in plaintiffs' class, the district court ignored the oft-repeated admonishment of this Court that "[o]nce it is determined that due process applies, the question remains what process is due." *Goss* v. *Lopez, supra,* 419 U.S. at 577; *Morrissey* v. *Brewer, supra,* 408 U.S. at 481. Due process is, of course, a flexible concept which must vary according

to the particular circumstances and competing interests involved in a specific situation. *Smith* v. *Organization of Foster Families for Equality & Reform,* 97 S.Ct. 2094 (1977); *Morrissey* v. *Brewer, supra,* 408 U.S. at 481. "[T]he interpretation and application of the Due Process Clause are intensely practical matters," *Goss* v. *Lopez, supra,* 419 U.S. at 578, and "[t]he very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation." *Wolff* v. *McDonnell, supra,* 418 U.S. at 560; *Cafeteria & Rest. Workers Union* v. *McElroy,* 367 U.S. 886, 895 (1961). Accordingly, "not all situations calling for procedural safeguards call for the same kind of procedure." *Morrissey* v. *Brewer, supra,* 408 U.S. at 481; *see Matthews* v. *Eldridge, supra.*

In the instant case, Amici believe that the lower court failed to take into account two fundamental factors that must be considered in any analysis of what process is due when parents seek to admit their child to a mental health institution: (1) the parents' independent constitutional right and responsibility to control the upbringing of their child; and (2) the severe harms that can be caused in certain situations by application of a traditional due process hearing procedure—which was designed for conflicts between the state and an individual—to the very different and emotion-laden situations that arise when the essential conflict appears to be between parent and child. Proper recognition of these factors should lead this Court to conclude that, while due process hearing procedures are appropriate in certain categories of children's mental health admissions, the remedy imposed by the district court nevertheless fails to reflect an adequate

regard for the important and sometimes competing interests at stake in the different categories of cases encompassed within this litigation.

A. Parents Have a Basic Constitutional Right to Control the Upbringing of Their Children

This Court has repeatedly emphasized the long-recognized right of parents to control the upbringing of their children. More than fifty years ago, in *Meyer* v. *Nebraska,* 262 U.S. 390, 399 (1923), the Court included within those liberties protected by the Fourteenth Amendment the basic right to "bring up children." Shortly thereafter the Court relied on the *Meyer* decision in *Pierce* v. *Society of Sisters, supra,* to declare unconstitutional a state law that required parents of children between eight and sixteen years of age to send their children to public, rather than private, school. The Court held that it was "entirely plain that the [statute] unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control." *Id.* at 534-35. As these decisions recognize, parents' authority to control the upbringing of their children is "basic in the structure of our society." *Ginsberg* v. *New York*, 390 U.S. 629, 639 (1968).

More recently, in *Wisconsin* v. *Yoder, supra,* 406 U.S. at 232, the Court emphasized the "primary role of the parents in the upbringing of their children," noting that this relationship is embedded in "[t]he history and culture of Western civilization" and is "now established beyond debate as an enduring American tradition." *See also Stanley* v. *Illinois,* 405 U.S. 645, 651 (1972); *Prince* v. *Massachusetts, supra,* 321 U.S. at 166.

Finally, this past Term in *Smith* v. *Organization of Foster Families for Equality & Reform, supra,* the Court again stressed that the right of family privacy is predicated on "a relationship having its origins entirely apart from the power of the State . . . ," 97 S.Ct. at 2110, explaining:

> "The importance of the familial relationship, to the individuals involved and to the society, stems from the emotional attachments that derive from the intimacy of daily association, and from the role it plays in 'promot[ing] a way of life' through the instruction of children, *Wisconsin* v. *Yoder,* [*supra*], as well as from the fact of blood relationship." *Ibid.*

See also id. at 2119 (Stewart, J., dissenting); *Moore* v. *City of East Cleveland,* 97 S.Ct. 1932, 1935-36 (1977) (plurality opinion).

These parental rights are not, of course, without limitations. *See Prince* v. *Massachusetts, supra,* 321 U.S. at 166. Thus, while parents generally have the right to give or withhold consent for most surgical procedures for their children, *see Bonner* v. *Moran,* 126 F.2d 121 (D.C. Cir. 1941); *Scaria* v. *St. Paul Fire & Marine Ins. Co.,* 68 Wis. 2d 1, 227 N.W.2d 647 (1975), courts have overruled parents' religious objections and ordered blood transfusions that were necessary to save the child's life. *See, e.g., People* v. *Labrenz,* 411 Ill. 618, 104 N.E.2d 769 (1952); *Muhlenberg Hosp.* v. *Patterson,* 128 N.J. Super. 498, 320 A.2d 518 (1974). Such interference with parental discretion, however, has been rare and is generally limited to instances where a child is in danger of suffering grevious harm. *See, e.g., Planned Parenthood* v. *Danforth, supra,* where the Court held that a minor fe-

male's right to decide whether to terminate her pregnancy outweighs her parents' right to control her actions by refusing to consent to an abortion.[2]

With rare exceptions, such as those reviewed above, governmental respect for parental decision-making has been considered essential to preserving the integrity of family life. Under our social and legal system, parents necessarily must assume responsibility for the myriad of difficult decisions concerning the health and welfare of their children. A basic corollary of that responsibility or duty is the parents' right to make those decisions free from unreasonable outside interference. *See* Kleinfeld, *Balance of Power Among Infants, Their Parents and the State,* 4 Fam. L.Q. 409, 413 (1970). Day in and day out, parents are called upon to make decisions of vital significance to the child's "liberty" or "property" interests—should the child be sent to boarding school, have a tonsillectomy, be required to work after school? And, despite the importance of these decisions, it is seldom suggested that the child

[2] *See also Muhlenberg Hosp.* v. *Patterson, supra,* 320 A.2d at 521; Note, *State Intrusion into Family Affairs: Justifications and Limitations,* 26 Stan. L. Rev. 1383, 1398-99 (1974) (standard is one of "severity and irreversibility" of harm to child); Note, *Child Neglect: Due Process for the Parent,* 70 Col. L. Rev. 465, 472 (1970) ("the state should not be permitted to take this drastic step [intervening in parental decisions] without demonstrating that the child has been inflicted or threatened with serious harm"). *Compare In re Green,* 448 Pa. 338, 292 A.2d 387, 392 (1972) (state interest in child's health outweighs parents' religious belief only when child's life immediately imperiled), *with In re Seiferth,* 309 N.Y.2d 80, 127 N.E.2d 820, 137 N.Y.S.2d 35 (1955) (parental refusal to allow operation to correct cleft palate upheld), *and In re Hudson* 13 Wash. 2d 673, 126 P.2d 765 (1942) (parental refusal to permit removal of daughter's grossly deformed arm upheld, even though condition would result in permanent psychological and circulatory damage).

should have a right to legal representation and a hearing to review each such parental determination. The reason is clear: the parents' interest in preserving their authority and exercising their independent responsibility normally outweighs a child's interest in a legal procedure to question each such decision.

In sum, in determining what procedures should be required by the Due Process Clause when parents seek to admit their child to residential psychiatric care, the court below erred by failing to give any consideration to the parents' independent constitutional right and responsibility to control the care and upbringing of their children. This right is fundamental; in our society the fabric of family life is woven out of the diversity of our citizens and their differing family traditions. This rich heritage ought not readily be displaced by uniform solutions or procedures of government.

B. A Blanket Rule Requiring Immediate Due Process Hearings in All Cases Would Frequently Result in Psychological Harm to the Children.

Another factor which the lower court unfortunately failed to consider is the very real danger that traditional due process procedures may in certain cases inflict psychological harm on children because of the unique emotion-laden nature of the parent-child conflicts that will be aired in those hearings. It is dangerously easy for the courts to assume that the procedural model mandated for juvenile delinquency hearings, *see In re Gault, supra,* can be adapted with little modification to psychiatric admission cases. From a clinical standpoint, however, this is highly improper. Indeed, if the procedural rights granted to children

in order to oppose the state in a juvenile delinquency proceeding were applied without exception to cases where children oppose their parents' decision to obtain psychiatric help for them, the result might be to strain, if not irrevocably rupture, the essential emotional relationship between parent and child. *See generally Wolff* v. *McDonnell, supra,* 418 U.S. at 563, 567 ("there would be great unwisdom in encasing the . . . procedures in an inflexible constitutional straitjacket that would necessarily call for adversary proceedings [that would] very likely raise the level of confrontation"; rules of procedure should be "shaped by the consequences which will follow their adoption").

Amici must emphasize that judicial procedures that may be commonplace and comfortable for lawyers and judges are extremely unpleasant, if not traumatic, for children and parents caught up in what is at best a very difficult emotional process. The most conscientious parents frequently struggle for some time to accept the judgment of a psychiatrist that placement in a residential institution is in the best interest of their child. "For most parents hospitalization [of their child is] a traumatic experience. . . ." E. HARTMANN, ET AL., ADOLESCENTS IN A MENTAL HOSPITAL 84 (1968).[3] To

[3] "For most parents, the placement of a child in a psychiatric treatment facility entails considerable expense and some humiliation." Lessem, *On the Voluntary Admission of Minors,* 8 U. Mich. J. Law Reform 189, 203 (1974); *see* Mandelbaum, *Parent-Child Separation: Its Significance to Parents,* in G. WEBER & B. HABERLEIN, RESIDENTIAL TREATMENT OF EMOTIONALLY DISTURBED CHILDREN 68, 74 (1972):

> "What are the feelings of parents who face the prospect of residential treatment for their child? . . . [D]uring the admission procedure a universal reaction is that the child's need of residential treatment reveals their inadequacy as parents. They have been found deficient in qualities of goodness."

subject parents and children to the additional unpleasant ordeal of a hearing at which adversary counsel would cross-examine the parents concerning their motivations, good faith, and possibly their own emotional problems,[4] could have significant negative consequences.

First, it might deter some parents from proceeding with needed residential treatment for their children.[5] This is a serious problem because, in spite of the common and frequently justified criticisms of our nation's mental health institutions for children, the appropriate form of care and treatment for many disturbed children still includes some period of residential care.[6] In-

[4] *See* Ellis, *Volunteering Children: Parental Commitment of Minors to Mental Institutions,* 62 Cal. L. Rev. 840, 889-90 (1974):

> "In the hearing, the lawyer will in most cases want to examine the parents as witnesses in order to explore their reasons for seeking the child's commitment, their perceptions of the child's problems, and their relationship to the family's problems."

[5] A "normal" reaction to their child's emotional illness is for parents to look for reasons why they need not or cannot hospitalize their child. *See, e.g.,* Philips, *et al., Intake for Inpatient Care,* in S. SZUREK, I. BERLIN & M. BOATMAN, INPATIENT CARE FOR THE PSYCHOTIC CHILD 66, 68 (1971):

> "In our experience . . . many parents of severely disturbed childen ask for help in such negative and distorted ways as to half-invite rejection. Requests may be phrased: 'I am calling just to find out how long the waiting list is.'"

The additional hurdle of an adversarial hearing would further discourage, or be used as an excuse by, confused, dejected parents who, despite their better judgment, fear hospitalizing their child.

[6] *See, e.g.,* Khan, *"Mama's Boy" Syndrome,* 128 Am. J. Psychiatry 712 (1971). *See generally* Tizard, *et al., Environmental Effects on Language Development: A Study of Young Children in Long-Stay Residential Nurseries,* in S. CHESS & A. THOMAS, ANNUAL PROGRESS IN CHILD PSYCHIATRY AND DEVELOPMENT 705, 728 (1974):

> "In conclusion, we would argue that in view of the wide va-

deed, studies continue to suggest that one of the fundamental problems in mental health today is not "over-institutionalization," but rather the shortage, due to lack of resources, of high-quality residential facilities. *See* R. GLASSCOTE, M. FISMAN & M. SONIS, CHILDREN AND MENTAL HEALTH CENTERS, PROGRAMS, PROBLEMS, PROSPECTS 24 (1972) (number of young people requiring psychiatric treatment is "many times the number who at present are receiving any treatment"); JOINT COMM. ON MENTAL HEALTH OF CHILDREN, CRISIS IN CHILD MENTAL HEALTH: CHALLENGE FOR THE 1970's, at 6 (1969) ("for every child admitted to [a good private residential facility] ten or more are turned away because of lack of space"; "the fact is that only a fraction of our young people get the help they need at the time they need it"). Hospitalization must be considered as only one phase, but sometimes a necessary phase, of the total treatment of many patients. *See, e.g.,* Rabiner & Lurie, *The Case for Psychiatric Hospitalization,* 131 Am. J. Psychiatry 761, 764 (1974).

In short, Amici firmly believe that hospitalization is helpful to many patients, both adults and children, and is the treatment of choice for many acute and severe psychiatric conditions.[7] Judicially imposed procedural

riety of institutional settings, and the evidence from this and earlier studies . . . of their varying effects on development, it is perhaps time to abandon the concept of 'the institution' as a factor in development, and to replace it with a consideration of the effects of different institutional regimens on different aspects of development."

See also Rinsley & Inge, *Psychiatric Hospital Treatment of Adolescents,* 25 Bull. of the Menninger Clinic 249 (1961); D. HOLMES, THE ADOLESCENT IN PSYCHOTHERAPY 132-41 (1964).

[7] While reliable empirical data are lacking in this area, "[c]linical impressions do suggest . . . that good residential treatment programs lead to more satisfactory development and functioning in the child than might otherwise have occurred if the child had not been admitted." Lewis & Solnit, *Residential Treatment,* in A. FREEDMAN, ET AL., COMPREHENSIVE TEXTBOOK OF PSYCHIATRY II, at 2249 (1975).

requirements therefore should not be so onerous as to deter parents from seeking residential psychiatric care for their children in appropriate cases.

Second, hearing procedures can severely strain the relationship between the parent and the child. The aspect of hearings which is most distressing to children relates to the "negative remarks made about them by the parents," Snyder, *The Impact of the Juvenile Court Hearing on the Child,* 17 Crime and Delinquency 180, 189 (1971), thereby adding to the burden of a family attempting to deal constructively with its problems. For example, in possibly analogous cases dealing with "persons in need of supervision," or minors who traditionally have fallen under the jurisdiction of the juvenile court, studies show that judicial proceedings are "damaging to an already strained family situation":

> "Whatever motivates parents to bring their children before the court, the courtroom experience does not generally ameliorate existing animosities, despite the supposedly 'protective' nature of the proceeding. To the contrary, able defense attorneys become surrogate parents and necessarily proceed to 'destroy' the natural parents verbally on cross-examination before the defendant-child." Stiller & Elder, *PINS—A Concept in Need of Supervision,* 12 Am. Crim. L. Rev. 33, 59 (1974).

Because of these problems, formal adversary proceedings may create more family dissension and risk

the further breakdown of family structure, especially in cases involving younger children. *See* Note, *Recognition and Protection of the Family's Interests in Child Abuse Proceedings,* 13 J. Fam. Law 803, 813 (1974). Thus, rather than deterring parents from "dumping" their children, due process hearings in some instances may enhance the likelihood of just such an unwanted and negative outcome.

The traditional court sanction directed towards parents who mistreat their children through child abuse or child neglect is to remove the child from the home. In the situations of concern to the court below ("unneeded" child hospitalization), such a sanction would be meaningless. Confronted by a "victorious" child—one not permitted by a court to be hospitalized—parents may feel they have no other alternative but to turn the care of the child over to the state. As a result, a child who might have been hospitalized, visited by his or her parents, and eventually returned home, instead would be confronted with the complete rupture of the parent-child bond.

Finally, studies have found that in certain instances court hearings create a considerable feeling of uneasiness, if not anger, in the child.[8] Based upon clinical experience, Amici have found that younger children, in particular, are likely to be intimidated and confused by formal hearing procedures. The course of the child's therapy may be harmed by what the child might perceive as an attack on the competence and judgment of the child's therapist who is recommending residential treatment.[9]

[8] *See* Snyder, *The Impact of the Juvenile Court Hearing on the Child, supra,* at 181.

[9] *See* Miller, *Children's Rights and the Juvenile Court,* in AMERICAN PSYCHIATRIC ASS'N, SCIENTIFIC PROCEEDINGS IN SUMMARY FORM, 129TH ANNUAL MEETING 35-36 (1976):

> "The adversary role of lawyers is antithetical to good child care for a variety of reasons. The disturbed child who goes to court abandons the right to confidentiality and a perceived attack on a therapist may negate the value of therapy. A child may perceive a therapist as being devalued. Repeated legal recheck as to the necessity for treatment can create doubt in the child as to whether the designated helpful person can be trusted."

In short, as this Court recently recognized in a case presenting issues essentially identical to the instant case, "such a hearing with its propensity to pit parent against child might actually be antithetical to the best interest of the young juveniles." *Kremens* v. *Bartley,* 97 S.Ct. 1709, 1718 (1977).

Not only do hearings create substantial risks of harm in some cases, but their supposed benefits in these situations are often overstated. Unfortunately, the promise of procedural due process as an effective check on improper institutionalization frequently proves illusory. Most judicial commitment proceedings are "perfunctory, ritualistic, impersonal, superficial, and presumptive of mental illness." Beran & Dinitz, *An Empirical Study of the Psychiatric Probation-Commitment Procedure,* 43 Am. J. Orthopsychiatry 660 (1973).[10] Thus, simply providing hearing procedures, especially before there is sufficient opportunity for institutional psychiatrists to work with the child and

[10] These authors report one study of 64 such hearings which found that the average hearing lasted only 4.45 minutes, with the court most often accepting uncritically the psychiatric recommendation. *Id.* at 664, 667. Other studies have reached similar conclusions. *See, e.g.,* T. SCHIFF, BEING MENTALLY ILL: A SOCIOLOGICAL THEORY 135 (1971).

present a full report and meaningful evaluation to the tribunal, may not provide the significant protection plaintiffs seek. Nor will it contribute to dealing with the larger problem of improving the care and treatment available for mentally ill children.[11]

Moreover, while advocates of hearing procedures point out that psychiatric commitment in our society unfortunately continues to carry with it an element of stigma,[12] they fail to recognize that such stigma is far more likely to result from a procedure by which a court hears evidence and makes a judicial commitment determination than in instances where a child is admitted to a hospital by his or her parents, without court intervention.

It should further be noted that even with truncated hearings the procedural system mandated by the court below would be extremely time-consuming and expensive. After performing other medical and administrative duties, the average hospital staff psychiatrist is able to devote only 47 percent of his or her time to direct patient care. *See* JOINT INFORMATION SERVICE, ELEVEN INDICES 14 (1971). Any significant increase in

[11] *See* Tamilia, *Neglect Proceedings and the Conflict Between Law and Social Work*, 9 Duquesne L. Rev. 579, 589 (1971) ("Equal justice through procedural safeguards that does not require substantive justice for each individual is not enough"); J. POLIER, THE RULE OF LAW AND THE ROLE OF PSYCHIATRY 100 (1968):

> "While the progress made in protecting the constitutional rights of the child in the adjudicatory process is to be welcomed, it will in no way compensate for the lack of dispositional remedies. *Gault* may protect some children from unfair hearings and wrongful findings, but it will not provide one dollar's worth of professional mental health services or one hour of care for any troubled child."

[12] *See generally* Roth, *Some Comments on Labeling*, 3 Bull. Am. Acad. Psychiatry & Law 123 (1975).

the number of hearings required not only would encroach still further on the psychiatrists' limited time for patient care, it also would require the expenditure of substantial amounts of money for legal fees, court personnel, etc.—costs which most likely would be drawn from already inadequate state mental health budgets.[13]

Amici recognize that abuses occur under the present system. Unfortunately, all too many of the nation's psychiatric institutions are unaccredited and lack the resources necessary to provide high-quality care and treatment for the many children requiring that assistance.[14] Nor can there be any doubt that in some cases unfit parents may seek to abandon their responsibilities by "dumping" their children into inappropriate residential institutions. But the remedy for these problems must be fashioned carefully by the courts so as not to deter the appropriate use of high-quality institutions by the vast majority of conscientious parents who are seeking help for their disturbed children. In the section that follows, Amici will suggest how the Court should balance these factors in order to provide for due process hearing procedures in the situations where they can be most effective, while avoiding the

[13] *See* Friendly, *"Some Kind of Hearing,"* 123 U. Pa. L. Rev. 1267, 1276 (1975):

> "It should be realized that procedural requirements entail the expenditure of limited resources, that at some point the benefit to individuals from an additional safeguard is substantially outweighed by the cost of providing such protection, and that the expense of protecting those likely to be found undeserving will probably come out of the pockets of the deserving."

[14] *See* JOINT COMM. ON MENTAL HEALTH OF CHILDREN, *supra* at 42 (1969) ("most [residential care facilities for mentally ill children] are disgraceful and intolerable").

adverse consequences that inevitably would follow from the undiscriminating approach of the court below.

II. BALANCING THE COMPETING CLAIMS AND INTERESTS AT STAKE IN THIS CASE, THIS COURT SHOULD EXCEPT FROM DUE PROCESS HEARING REQUIREMENTS THOSE CASES IN WHICH (1) PARENTS IN AN INTACT FAMILY WISH TO ADMIT (2) A PRE-ADOLESCENT CHILD TO (3) AN ACCREDITED INSTITUTION (4) FOR A SHORT-TERM PERIOD.

Despite the problems and shortcomings of providing due process hearings for children who are to be hospitalized for mental health treatment, Amici nevertheless believe that there are circumstances where some form of hearing is constitutionally appropriate. It is a well-recognized clinical fact that extended hospitalization in an inappropriate facility can have serious debilitating effects on a child's development. *See generally* B. FLINT, THE CHILD AND THE INSTITUTION (1966); S. PROVENCE & R. LIPTON, INFANTS IN INSTITUTIONS (1962). In view of this fact, Amici believe that in certain instances a due process hearing, informed by proper clinical judgments, can serve an important purpose; it may help eliminate needless hospitalization by eliciting information that may result in placing a child in a non-hospital treatment setting or allowing the child sensibly to remain with his or her family.

In large measure, due process hearings for children are needed because most states are unwilling to devote the resources necessary to provide proper mental health care for their citizens. In this regard, appellants have mistakenly attempted to characterize the decision below as resting on the fact that psychiatry is an "inexact science" and that "psychiatrists are capable

of erring." (Appellants' Brief at 15, quoting 412 F. Supp. at 138.) A fair reading of the opinion, however, makes clear that the court placed the blame precisely where it belongs—on the state. In the court's words:

> "This court is impressed by the conscientious, dedicated state employed psychiatrists who with the help of equally conscientious, dedicated state employed psychologists and social workers, faithfully care for the plaintiff children *to the extent that state furnished resources and facilities permit.*" 412 F. Supp. at 138 (emphasis supplied).

Moreover, the court did not suggest, as appellants argue, that psychiatric fallibility was a "*justification* for . . . dilut[ing] the authority of a parent to seek and obtain medical assistance for his child, . . ." (Appellants' Brief at 15 (emphasis supplied).) Rather, the court simply stated that such fallibility meant that psychiatrists

> "cannot statutorily be given the power to confine a child in a mental hospital without procedural safeguards being imposed to guard against errors in judgment and/or the arbitrariness that the best of us humans exhibit from time to time." 412 F. Supp. at 138.

While Amici disagree in part with the court below in that we believe that there are countervailing factors that justify foregoing hearings in certain circumstances, we do not maintain, as do appellants, that psychiatric expertise can justify the elimination of due process hearings in *all* circumstances involving children under 18 years of age.

In elaboration of their effort to suggest that the decision below was predicated on the court's dissatis-

faction with psychiatry, appellants also make the unsupported assertion that the decision rested "on the idea that psychiatrists and psychiatry are unreliable, because psychiatrists supposedly disagree routinely on the particular labels and diagnoses to be given mentally ill persons." (Appellants' Brief at 17.) While Amici agree with appellants that psychiatric diagnoses—*i.e.*, identification of specific mental illnesses—are medically reliable, we recognize that this fact is not dispositive of the issue of when a hearing is constitutionally required. Even if a child is properly diagnosed, it does not follow that hospitalization is necessary or desirable. Rather, Amici believe that in appropriate circumstances a due process hearing may provide a reasonable forum for deciding what care should be provided to a properly diagnosed child. What follows is an analysis of those factors that should be considered in deciding when a due process hearing is both desirable and constitutionally required for a particular child.

Amici have already demonstrated that due process hearing procedures have a very real potential for harm to the interests of both parent and child in certain circumstances. The most serious deficiency of the decision below is that it ignored these potential harms and greatly oversimplified complex clinical realities in order to fit this case into a traditional, unbending due process mold. The class of plaintiffs before this Court is far from uniform, however, and the procedural requirements best suited to their differing interests must also vary, depending on several key factors totally ignored by the court below.

The interests of the child and the parent, and the concomitant potential of hearing procedures to produce benefit or harm, will differ radically, depending on

such factors as (1) the identity of the party seeking the child's psychiatric admission—whether it is a parent, or a state institution such as the welfare department; (2) the age of the child; (3) the quality of the proposed institution; and (4) the duration of the proposed commitment—whether, for example, it is a week of "respite care," designed to assist parents of a severely disturbed child, or whether instead it is an indefinite institutionalization of a child who may be expected to remain hospitalized for many years. Although critical, these factors were not considered in the district court's undifferentiated ruling requiring the same hearing procedures for all cases.

Amici respectfully urge this Court to recognize these very real differences as they relate to the propriety of imposing a traditional due process model, and to balance these factors so as to except from adversary hearing requirements any instance in which *all* of the following four factors are met: (1) parents in an intact family wish to admit a (2) pre-adolescent child to (3) an accredited institution (4) for a short-term period (*e.g.*, less than 45 days). Amici will now set forth the considerations that should lead the Court to this resolution.

First, the clearest line that should be drawn is between parent-initiated admissions and those instances in which an institutional guardian, such as a state welfare department, seeks to institutionalize a child. *See Smith* v. *Organization of Foster Families for Equality & Reform, supra,* 97 S.Ct. at 2114 ("Whatever liberty interest may be argued to exist in the foster family is significantly weaker in the case of removals preceeding return to the natural parent, and the balance of due process interests must accordingly be different"). The dangers of adversary hearing procedures referred to

in Section IB above—such as the risk to the parent-child emotional relationship inherent in such hearings —are not so compelling when a state agency, rather than a parent, seeks the admission. Moreover, the interest in parental integrity and the assurance of parental responsibility to minimize risks of abuse are not present in such cases. Accordingly, where a psychiatric admission is sought by a state institution, rather than a parent in an intact family, Amici believe that hearing procedures may be appropriate.

A second factor ignored by the court below is the age of the child. In remanding the case of *Kremens* v. *Bartley, supra,* this Court recently took specific note of "the very possible differences in the interests of the older juveniles and the younger juveniles." 97 S.Ct. at 1718. *See also Smith* v. *Organization of Foster Families for Equality & Reform, supra,* 97 S.Ct. at 2108 n. 44 ("children usually lack the capacity to make [a] decision [about foster care]"); *Planned Parenthood* v. *Danforth, supra,* 96 S.Ct. at 2844 ("our holding . . . does not suggest that every minor, regardless of age or maturity, may give effective consent for termination of her pregnancy"). These distinctions, recognized by this Court but ignored by the court below, are clinically important.

Amici believe that the distinction between adolescents and younger children is critical in assessing the impact of hearing procedures on children, and that this distinction should be legally recognized. The professional literature establishes that when children reach a *developmental age* [15] of approximately 13 they begin

[15] The concept of developmental age is quite different from that of chronological age and, in instances where the two differ significantly, developmental age should control. *See generally* T. ACHENBACH, DEVELOPMENTAL PSYCHOPATHOLOGY (1974). Mentally ill children frequently exhibit signs of developmental failure as a symptom of their illness. In view of this fact, any fixed chronological age is sure to be somewhat arbitrary. *See* note 16 *infra.*

to be significantly more capable of rational and analytical evaluation of their own best interests, as well as articulate expression of their views.[16] Adolescents will be far less threatened by hearing procedures and will be much more capable than pre-adolescents of using these procedures effectively. Indeed, Georgia has implicitly recognized this distinction between adolescents and younger children by authorizing children 14 years or older to volunteer themselves for mental health observation and diagnosis. Ga. Code Ann. § 88-503.1 (b).

A third factor ignored by the court below is the quality of the institution being proposed for the child. Amici believe that this factor not only has profound significance from the standpoint of the child and the mental health professional, but also should be relevant

[16] The authorities vary somewhat concerning the precise developmental age at which these skills are present. The consensus is that the age range is from 12-14. *See, e.g.,* Schwartz, *Children's Concepts of Research Hospitalization,* 287 New Eng. J. Med. 589 (1972); Note, *State Intrusion into Family Affairs: Justifications and Limitations, supra,* 26 Stan. L. Rev. at 1395. *See generally* J. PIAGET, MORAL JUDGMENT OF THE CHILD 17, 40 (1932); A. GESELL, F. ILG, & L. AMES, YOUTH: THE YEARS FROM TEN TO SIXTEEN 175-182 (1956); Neubauer, *Normal Development in Childhood* in B. WOLMAN, MANUAL OF CHILD PSYCHOPATHOLOGY 11 (1972). Amici believe that states should be given considerable flexibility in selecting an appropriate age distinction within this general range. *See Smith* v. *Organization of Foster Families for Equality and Reform, supra,* 97 S.Ct. at 2115 ("In a matter of such imprecision and delicacy" states are accorded wide constitutional latitude in drawing an appropriate line).

to the legal determination of what procedural rules are appropriate in these instances. *See Smith* v. *Organization of Foster Families for Equality and Reform, supra* (different constitutional procedures required where children are removed from a foster family and returned to natural parents than when children are sent from foster family to an institution). The sad truth is that the present quality of mental health institutions for children varies dramatically throughout the nation. There are many excellent institutions that are fully staffed and possess the resources necessary to provide a child with prompt treatment that is best suited to his or her needs. Many other institutions, however, are woefully lacking in trained staff and resources and in some cases may do little more than "warehouse" children. The Joint Commission on Accreditation of Hospitals, a recognized professional body which certifies institutions as meeting the minimum standards necessary for appropriate care, has denied accreditation status to numerous institutions throughout the country which are failing to provide adequate mental health care for children and adolescents.

Amici believe that the risk of psychological injury to children who are placed in such unaccredited institutions is sufficiently great to outweigh the possible harm of hearings. Hence, Amici recommend that no admission to an unaccredited institution should be sanctioned by the state absent a due process hearing at which the alternatives to such a placement would be fully evaluated.

Finally, the district court lumped together in its ruling virtually all admissions, regardless of duration.

Amici believe that in view of the potentially harmful aspects of admission hearings discussed above, a constitutionally imposed procedural rule should not forbid states from taking into account the very significant differences between short-term and long-term institutionalization. It is well-recognized that families who seek to care for their mentally disturbed children at home have episodes of crisis that may be effectively relieved by brief periods of hospitalization for these children. Such temporary crisis intervention is often sufficient to resolve a pattern of intensifying and destructive conflict. Similarly, certain mental and emotional problems typically can be cured by short-term institutional care.

The court below was not totally unaware of this distinction between short- and long-term care. Indeed, what troubled the court was the power of parents under the Georgia statute "to *indefinitely* hospitalize their children in an arbitrary manner." 412 F. Supp. at 138 (emphasis supplied). Nevertheless, the court effectively mandated pre-admission hearings (or, in emergencies, hearings shortly after admission) irrespective of the nature or duration of the potential hospitalization. Such procedures needlessly impose a cruel price on the very people who are trying the hardest to care for their children by keeping them at home and relying only on brief periods of institutionalization. To force states to adopt such procedures as a constitutional requirement simply makes no sense.

This Court has already recognized and affirmed the appropriateness of a state's allowing *short-term* psychiatric institutionalization prior to commencement of due process hearing procedures. *Briggs* v. *Arafeh,* 411

U.S. 911 (1973), *aff'g summarily Logan* v. *Arafeh,* 346 F. Supp. 1265 (D. Conn. 1972). In *Arafeh,* the Court affirmed the decision of a three-judge United States District Court rejecting a constitutional challenge to a state statute that authorized involuntary mental hospital commitment of adults who are certified by physicians to be suffering from mental illness and to be dangerous to themselves or others. The statute in question authorized confinement without any prior notice or hearing, and provided that if the patient objected to the hospitalization and the state nevertheless wished to continue the commitment, the patient would receive the right to counsel and an adversary hearing "not more than 45 days" after the initiation of commitment proceedings. *Logan* v. *Arafeh, supra,* 346 F. Supp. at 1267 n.3. In language that is directly applicable to the instant case, the district court held that the 45-day period before hearing procedures would be required is not only constitutional, but entirely reasonable in light of the expert testimony from professionals in this field:

> "Testimony received from expert witnesses established that the [delay] after initial commitment before judicial proceedings must be begun is not simply for the purpose of delay. It has a positive aspect as well. There is a compensating advantage to the committed person because in many cases during this period the medical staff at the hospital can adequately alleviate his mental illness or by use of non-emergency diagnostic procedures determine that he is not a 'danger to himself or others.' In such cases, the stigma of court record is avoided and the length of confinement is shortened. It must be remembered that commitment has not been undertaken for the sake of penal detention. The patient is committed for

> treatment and care, and some knowledge of his mental condition can be gained by visual observation and diagnostic tests. This takes time. On the other hand, where a full blown court trial must be had pursuant to § 17-178, additional time to undertake more elaborate testing of the patient's mental condition, and a more detailed probe into his relevant history, by both the hospital authorities and the expert witnesses who will testify in behalf of the patient is needed.
>
> While it is possible that all of this could be concentrated into a shorter period of time, we are satisfied that the time which is allowed by the statute is not so unreasonably long as to amount to a denial of due process. The time provisions set by the legislature are fully supported by the opinions of competent physicians specializing in the treatment and care of persons suffering from mental illness. We hold that there is a rational basis for the time allowed by the statute." *Id.* at 1268-69.

The *Briggs* v. *Arafeh* precedent was followed recently in *Coll* v. *Hyland,* 411 F. Supp. 905, 910 (D.N.J. 1976) (three-judge court) (20-day delay between commitment and hearing held constitutional). *See also Saville* v. *Treadway,* 404 F. Supp. 430, 437-38 (M.D. Tenn. 1974) (upholding 45-day "respite care" and six-month "Short-Term Training Admissions" for mentally retarded children, absent hearing procedures); *Fhagen* v. *Miller,* 29 N.Y.2d 348, 278 N.E.2d 615, 328 N.Y.S.2d 393, *cert. denied,* 409 U.S. 845 (1972) (upholding procedure allowing confinement for 15-25 days prior to hearing). The court below in the instant case erred in ignoring this precedent, which is directly applicable here."[17]

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[17] Lower courts are required to give no less precedential weight

The four factors discussed above suggest the type of balancing approach that should be used in resolving this appeal. In cases where the state rather than the parents has initiated the commitment proceeding, there are insufficient countervailing factors to outweigh the child's right to a due process hearing. Similarly, if the proposed admission is to an unaccredited institution, Amici believe that the risk of harm to the child is high enough to outweigh the potential dangers inherent in hearing procedures—damage to family autonomy, psychological harm of parent-child conflict at a hearing, or the possibility that procedures will deter parents from initiating the admission. In addition, drawing a distinction based on the age of children is constitutionally appropriate because older children have an increased ability and interest in expressing their opinions.

The final distinction Amici urge—between short-term and long-term admissions—also flows logically from a consideration of the shifting interests and risks in these cases. A basic premise of admissions for a short period, such as 45 days, is that the parents intend to maintain or strengthen the family unit and will resume care of the child during, or at the end of, the 45-day period. Such a period allows for emergency psychiatric intervention, evaluation of the child's psychiatric needs, or short-term intensive treatment. In cases where continued institutionalization appears necessary, the short delay prior to a hearing would assist mental health professionals in developing the most appropriate information to present to a tribunal concerning the

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to this Court's summary affirmances than to its other holdings. *See Hicks* v. *Miranda*, 422 U.S. 332, 344-45 (1975).

child's condition and their recommended treatment plan. Because the basic premise of a rule allowing short-term institutionalization without prior hearing procedures is that the child will return home shortly, the danger of parental abuse, or "dumping," is lessened significantly. The deprivation to the child in terms of lost liberty is also reduced. Indeed, it is not substantially greater than the loss sustained by a child hospitalized for a serious but necessary surgical procedure. Given the desirability of minimizing parent-child conflict when it is expected that the child will be returning soon to the family, formal adversary proceedings in these cases should be avoided.

The situation is quite different, of course, when parents seek a long-term institutionalization of their child. Whether such a parental judgment is based on a genuine feeling that it is in the child's best interest, or on a bad faith effort to "dump" the child, it opens the prospect that the parents may terminate the primary intra-family relationship they have had with the child. Even if the parents will be frequent visitors or active participants in the course of institutional treatment, the child's primary frame of developmental reference most likely will shift to some degree from the family to the institution. Thus, the intact family unit is being replaced, through parental choice, by the mental hospital as the primary agent of child rearing during a significant period of child development. Because the parents have chosen to relinquish control of the child to the institution, the possibility of an adversarial conflict between parents and child would not pose as serious a threat to ongoing intra-family relationships in such instances as would be the case when only short-term institutionalization is sought.

For these reasons Amici believe that a proper resolution of the relevant factors would require that any due process hearing procedures mandated by the Court should *not* extend to those instances in which *all* of the following four factors are present: (1) parents in an intact family wish to admit (2) a pre-adolescent child to (3) an accredited institution (4) for a short-term period (*e.g.*, less than 45 days).[18]

III. THE DISTRICT COURT PROPERLY RULED THAT WHEN THE STATE DEPARTMENT OF MENTAL HEALTH DETERMINES THAT MEDICALLY APPROPRIATE TREATMENT FOR CHILDREN REQUIRES PLACEMENT IN NON-HOSPITAL, COMMUNITY-BASED FACILITIES, THE STATE MUST PROVIDE SUCH FACILITIES.

It is apparent that the district court was troubled by the lack of non-hospital treatment facilities in Georgia, and by the resultant antitherapeutic effects of needless prolonged hospitalization on mentally ill children. Each of the named plaintiffs, for example,

[18] Once it is determined in which instances due process hearings should be required, Amici urge the Court not to limit the states' flexibility in seeking to establish the most appropriate types of forums and procedures to implement that decision. In most instances, the judgment to be made concerning possible institutionalization of a child requires consideration of many factors in addition to the child's mental condition—for example, what is the situation in the home, and how can beneficial treatment and counseling for other members of the family be provided? Amici believe that courts may not be the ideal forum for such determinations. Rather, an administrative tribunal may be the most effective way to include all of the relevant input, psychiatric as well as legal, in the decision-making process. *See In re Roger S.*, Crim. No. 19558 (Cal. Sup. Ct. 7/18/77). *See also* Hoffman & Dunn, *Beyond* Rouse *and* Wyatt, *An Adminstrative-Law Model for Expanding and Implementing the Mental Patient's Right to Treatment*, 61 Va. L. Rev. 297 (1975). In short, states should be free to experiment with a variety of mechanisms for implementing due process hearing requirements.

had been hospitalized for more than five years. Moreover, as the court stated:

> "That state officialdom—knowing definitely since said November 1973 study commission report of the crying need for non-hospital, alternative resources for the care and treatment of plaintiff children, and further knowing from said report of the large number of children who would not need hospitalization if other forms of care were available—has failed to even endeavor to provide such alternative resources demonstrates that even well-meaning state officials cannot be given the unlimited statutory authority to determine under what circumstances and for how long plaintiff children will be confined and detained by the state in its mental hospitals." 412 F. Supp. at 138.

In response to this concern, the court below took a small, but significant, step toward improving the opportunity for mentally ill children in Georgia to receive medically appropriate treatment.

During discovery, defendants were asked "to designate the [living] situation in which they would like to see the [members of plaintiffs' class] placed in order to get optimal benefits." 412 F. Supp. at 124. In response, defendants stated that 46 of the approximately 200 members of plaintiffs' class who were then hospitalized "could be optimally cared for in another, less restrictive, non-hospital setting if it were available."[19] *Id.* at 125. In view of this admission, the district court, relying on this Court's decision in *In re Gault, supra,* 387 U.S. at 27, and *Jackson* v. *Indiana, supra,* 406 U.S. at 738, ordered defendants to

[19] Defendants specifically designated the appropriate treatment settings for each of these 46 children. *See* 412 F. Supp. at 124 n. 18.

"proceed as expeditiously as is reasonably possible (1) to provide necessary physical resources and personnel for whatever non-hospital facilities are deemed *by them* to be most appropriate for these children, and (2) to place these children in such non-hospital facilities as soon as reasonably appropriate." 412 F. Supp. at 139 (emphasis supplied).

This relief provides a basis for the beginnings of a sensible solution that is both medically and socially compelling.

There can be little doubt that long-term hospitalization for children has been seriously overutilized, often serving as a means of social control—rather than medical treatment—for unwanted children. *See* JOINT COMM. ON MENTAL HEALTH OF CHILDREN, *supra;* A STONE, MENTAL HEALTH LAW: A SYSTEM IN TRANSITION, ch. 9 (1975). This practice has had a devastating impact on the children who have been forced to suffer the debilitating consequences of prolonged, needless hospitalization. *See, e.g.,* JOINT COMM. ON MENTAL HEALTH OF CHILDREN, *supra*; B. FLINT, THE CHILD AND THE INSTITUTION, *supra.* It is a sad commentary on the way in which our society cares for its disabled youth.

Nor can there be any dispute that care of mentally ill children in community-based facilities is to be preferred when such treatment is medically appropriate. *See, e.g.,* R. GLASSCOTE, ET AL., *supra,* at 20; Reiger *Changing Concepts in Treating Children in State Mental Hospitals,* 1 Int. J. Child Psychotherapy 59 (1972).[20] The goal of treatment is to enable a child to

[20] *See also,* JOINT COMM. ON MENTAL HEALTH OF CHILDREN, *supra* at 39:

"Children are best cared for and treated in atmospheres more related to health and normal living than to illness. Every effort should be made to keep the child as closely as possible within his normal setting. This means that we must expand non-hospital treatment arrangements, particularly those that could be operated under the auspices of community-based facilities, such as community mental health centers, educational settings, and social service agencies."

live independently or with his or her family in the community; if he or she need not be isolated from the community to receive proper treatment, the likelihood that a child will be able to make an effective transition to independent or family living is obviously enhanced.

In considering the constitutional underpinnings for the ruling below, it should initially be pointed out that the decision is very limited in scope. The court ruled simply that when *the professionals who staff the State Department of Mental Health determine that it is medically preferable to treat the children for whom they have assumed medical responsibility in non-hospital settings, the state must provide such facilities.* As the court stated, "[i]t is not for this court of three lay judges to choose the appropriate, less drastic form of care for each of these children: that decision we leave to the professional judgment of the defendant psychiatrists." 412 F. Supp. at 139. Hence, this is not a case like *Lake* v. *Cameron,* 364 F.2d 657 (D.C. Cir. 1966), where a federal judge was ordered to conduct an inquiry into alternatives to hospitalization, prompting then-Judge Burger to dissent on the ground that "a United States court in our legal system is not set up to initiate inquiries and direct studies of social welfare facilities or other social problems." *Id.* at 663. Significantly, in this case, the federal court left the task of determining the appropriate treatment facility to the professionals in the Georgia Department of Mental

Health who are properly charged with making such a decision.

In view of the limited nature of this holding, it is clear that basic, established principles of constitutional law will more than suffice to sustain the decision. In *Jackson* v. *Indiana, supra,* 406 U.S. at 738, while dealing with mental health commitments, this Court held that:

> "At the least, due process requires that the nature and duration of commitment bear some reasonable relation to the purpose for which the individual is committed."

See also O'Connor v. *Donaldson, supra,* 422 U.S. at 574-75.

There can be no question that the children in plaintiffs' class are "committed" patients in the legal sense in which the *Jackson* decision used that term. It is clear that these children have not themselves voluntarily sought treatment.[21] Moreover, pursuant to state law, Georgia has agreed to take responsibility for the proper care of the children, and has authorized their admission to a state mental health facility. Indeed, it is precisely for these reasons that due process procedures apply to all these children. Hence, the threshold requirement of *Jackson* is satisfied.

The next inquiry under the *Jackson* standard requires ascertainment of the "purpose" to be served by the commitment of children under Georgia law. The

[21] This conclusion is supported by the fact that under Georgia law children aged 14 or over can voluntarily apply for mental health observation and diagnosis. Ga. Code Ann. § 88-503.1(b). These "voluntary" children, of course, are not part of plaintiffs' class.

standard for the commitment of children in Georgia is "evidence of mental illness" and "suitab[ility] for treatment." Ga. Code Ann. § 88-503.1(a). The state has further clarified its purpose by stating that "each person receiving services for mental disorders shall receive care and treatment that is suited to his needs . . ." Ga. Code Ann. § 88-502.3(a). Thus, the sole purpose of committing children in Georgia is to provide medically appropriate treatment."[22]

In view of this purpose, when the professionals who under state law are responsible for the care of children determine that the medically appropriate treatment setting is a community-based, non-hospital facility, the "nature and duration" requirement of *Jackson* requires placement in such a facility. Hospitalization (*i.e.*, the "nature" of commitment) is plainly inconsistent with the treatment purpose when hospitalization is not the preferred setting. Likewise, hospitalization in such circumstances undermines the "duration" requirement since it may well needlessly prolong the time for treatment because the appropriate facility is not being used.

To be sure, one possible result of affirming this portion of the ruling below might be to prompt Georgia to decide to refuse to provide any care for children from intact families who cannot best be treated in a hospital setting.[23] Amici would certainly assume, how-

[22] Children in Georgia are *not* institutionalized on the basis of being dangerous to themselves or others.

[23] While this may be an unfortunate result, Amici nontheless consider such a result preferable to hospitalizing children who are not suited to such treatment. The harsh reality is that it is better to leave a mentally ill child in an intact family than to warehouse

ever, that Georgia would choose to establish proper facilities for treating its needy children, rather than abandon them. Moreover, insofar as plaintiffs' class includes children who are wards of the state, rather than members of intact families, the principles of *Jackson* plainly require the development of proper treatment facilities for these children. Pursuant to its *parens patriae* responsibility, the state must insure that the "nature" of its wards' placements "bear some reasonable relation to the purpose" of those placements. Thus, when Georgia determines that proper care of its wards is in a community facility, it must provide such. To do otherwise would not only be constitutionally deficient, but would constitute "neglect" on the part of the state.

In any event, once it is determined, as it has been in this case, that the appropriate treatment facility for a child is a non-hospital setting, the Due Process Clause requires that the child no longer be hospitalized. Accordingly, the court below correctly ruled that as to the 46 children in question for whom the Georgia Department of Mental Health has already assumed responsibility, and who under state law are entitled to "treatment that is suited to [their] needs," the state must provide the proper treatment setting.[24]

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him or her in a hospital that is not medically suited to provide adequate treatment.

[24] Nor is it of any constitutional moment that development of proper facilities may require the state to expend funds. *See Estelle* v. *Gamble*, 97 S.Ct. 285, 290 (1976) ("elementary principles establish the government's obligation to provide medical care for those whom it is punishing by incarceration"). In fact, as the district court noted in this case, "[t]he creation and operation of appropriate non-hospital facilities for these children will save rather than cost money, *i.e.*, hospital care costs some $40,000 per year per child whereas group home care costs some $7,500 per year per child; residential treatment care centers cost $12,000 per year per child." 412 F. Supp. at 144.

CONCLUSION

For the foregoing reasons, Amici urge this Court to affirm the decision below except insofar as it mandates due process hearings when (1) parents in an intact family wish to admit (2) a preadolescent child to (3) an accredited institution (4) for a short-term period.

Respectfully submitted,

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